No. 84-351 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

ATASCADERO STATE HOSPITAL
AND
CALIFORNIA DEPARTMENT OF MENTAL HEALTH,
PETITIONERS
v.
DOUGLAS JAMES SCANLON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

Whether Congress intended to abrogate the Eleventh Amendment immunity of a state that accepts federal funds under Section 504 of the Rehabilitation Act.

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INTEREST OF THE UNITED STATES

Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) prohibits discrimination against the handicapped in "any program or activity receiving Federal financial assistance."[1] At issue in this case is whether a private plaintiff

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[1]Section 504 provides, in pertinent part:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

alleging a violation of Section 504 may bring suit against a state seeking retrospective relief in the federal courts, or whether such a suit is barred by the Eleventh Amendment.

The United States has responsibility for enforcement of the equal employment provisions of the Rehabilitation Act.[2] The Court's decision in this case will not directly affect federal enforcement actions, since "the Eleventh Amendment [is] no bar to a suit by the United States against a State." *Edelman* v. *Jordan*, 415 U.S. 651, 669 (1974). Nevertheless, when this case first came before the court of appeals in 1980, the United States filed a brief as amicus curiae supporting the conclusion that the Eleventh Amendment did not bar this plaintiff's suit. That brief argued that "congressional intent to make states amenable to suit under Section 504 can be gleaned from the framework of the statute, its legislative history and the statutory purpose" (C. A. Br. 32).

We are convinced that our prior position was incorrect. Since our earlier brief the only other court of appeals that has squarely addressed the issue presented here held that Congress did not clearly intend to abrogate states' Eleventh Amendment immunity (*Ciampa* v. *Massachusetts Rehabilitation Comm'n*, 718 F.2d 1 (1st Cir. 1983)). Furthermore, this Court's decision last Term in *Pennhurst State*

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[2]The remedial provisions of the Act, Section 505 (29 U.S.C. 794a), provide, in pertinent part:

> (2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.
>
> (b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

School & Hospital v. *Halderman*, No. 81-2101 (Jan. 23, 1984), reaffirmed the standard used in *Ciampa*. And finally, this Court's decision last Term in *Consolidated Rail Corp.* v. *Darrone*, No. 82-862 (Feb. 28, 1984), which construed Section 504, shows that clear congressional intent to abrogate states' Eleventh Amendment immunity is lacking. A state's Eleventh Amendment immunity cannot be abrogated by congressional intent that is gleaned from the statute and its legislative history. Because the Eleventh Amendment represents a fundamental principle of allocation of power in our federal system, Congress should be taken to have abrogated states' immunity only by a clear and explicit expression of intent. This most exigent standard of explicit abrogation has not been met in this case.

STATEMENT

Respondent Douglas J. Scanlon suffers from diabetes mellitus and loss of vision in one eye. On November 21, 1979, he commenced suit against petitioner Atascadero State Hospital under Section 504 of the Rehabilitation Act of 1973 in the District Court for the Central District of California alleging that the Hospital denied him employment solely because of his physical disabilities. He claimed that the Hospital, which has received federal financial assistance under Section 504, violated that statute by denying him employment. He sought monetary, injunctive, and declaratory relief (Pet. App. 2a). The Hospital and the California Department of Mental Health, which operates the facility, moved to dismiss the action on two grounds: (1) that the Eleventh Amendment barred plaintiff's action; and (2) that plaintiff had failed to allege that the federal assistance received by petitioners was for the primary purpose of providing employment (*ibid.*).

The district court granted defendants' motion to dismiss the complaint, holding that the state agencies were protected by the Eleventh Amendment's grant of immunity

(Pet. App. 23a). The court rejected defendants' second ground for dismissal (Pet. App. 24a). The Ninth Circuit affirmed, but on the ground that "a private action under [Section 504] to redress employment discrimination cannot be maintained unless the primary objective of the federal financial assistance is to provide employment" (Pet. App. 9a). The court did not reach the Eleventh Amendment question at that time (Pet. App. 7a).

In November of 1982, plaintiff petitioned this Court for a writ of certiorari (No. 82-5812) to determine whether the federal financial assistance received by an employer must be for the primary purpose of providing employment to subject that employer to suit for employment discrimination under Section 504. The Court held the case while it considered *Consolidated Rail Corp.* v. *Darrone*, No. 82-862. On February 28, 1984, the Court held in *Darrone* that an employer could be sued under Section 504 regardless of the purpose of the federal financial assistance it had received. Consequently, on March 19, 1984, the Court granted plaintiff's petition for a writ of certiorari, vacated the court of appeals' decision, and remanded the matter for further consideration in light of the *Darrone* opinion.

On remand, the court of appeals found *Darrone* controlling with respect to the issue it had previously decided and contrary to its decision (Pet. App. 2a). Accordingly, the court proceeded to address the Eleventh Amendment question. The court recognized that the Eleventh Amendment "broadly bars federal court actions by private parties * * * against states and state agencies" (Pet. App. 3a). It further recognized that the Rehabilitation Act does not expressly provide for state liability and its legislative history does not make clear that Congress intended to make states liable (*ibid.*). Nevertheless, the court found that Congress had abrogated Eleventh Amendment immunity (*ibid.*). Its conclusion was based on the fact that Section 505(a)(2) of

the Act, 29 U.S.C. 794a(a)(2), provides for remedies against "any recipient of Federal assistance" and, therefore, states are literally included in the definition (Pet. App. 3a).[3] The court reversed the district court and remanded the matter for further proceedings (Pet. App. 5a).[4]

SUMMARY OF ARGUMENT

The immunity of states from private damage suits brought in federal courts is a fundamental constitutional guarantee of state sovereignty that underlies our federal system. While Congress may require states to waive their immunity as a condition of receiving federal funds, decisions of this Court make clear that it is essential that there be an unequivocal expression of congressional intent to abrogate states' Eleventh Amendment immunity before states will be held to have waived that immunity. Such an unequivocal expression may be found in a congressional mandate explicitly and in terms abrogating states' immunity from suit. Sometimes, however, Congress will subject to suit a broad class of entities — *e.g.*, "any recipient" — and states will fall into the literal meaning of that class definition. Such a general inclusion is not enough to constitute abrogation of the fundamental Eleventh Amendment

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[3]The court noted that the regulations implementing the Act, 45 C.F.R. 84.3(f), define "recipient" to include "any state or its political subdivision" (Pet. App. 3a).

[4]The court of appeals recognized that its decision conflicted with *Ciampa* v. *Massachusetts Rehabilitation Comm'n*, 718 F.2d 1 (1st Cir. 1983), and *Miener* v. *Missouri*, 673 F.2d 969 (8th Cir. 1982), and merely stated that it declined to follow those cases (Pet. App. 5a). While the First Circuit's decision in *Ciampa* is on point and contrary to the Ninth Circuit's holding, it is not clear that the Eighth Circuit decision is relevant. Although *Miener* involved the Rehabilitation Act, the court, in addressing the Eleventh Amendment question, referred only to the Education Act, 20 U.S.C. 1401 *et seq.* ("we have found no evidence in the legislative history that the Education Act was intended by Congress to abrogate the states' immunity" (673 F.2d at 981)).

immunity. There must be more to show that the apparent inclusion within a general class represented a focused congressional intention to include the states within that classification, and remove their Eleventh Amendment protection. This is because states, unlike other general members of a class, have a distinct role in our federal structure of government, and should not by inference alone be assumed to have been stripped of their sovereign and primary responsibility for the welfare of their citizens. The necessary showing of such a fundamental abrogation of state prerogatives may be supplied by legislative history, but only of the most focused, explicit, determinative kind.

Congress has not clearly expressed its intent to require states that receive funds under Section 504 to waive their Eleventh Amendment immunity. In this case there is literal reference to the states only by the designation in Section 504 of "any recipient" of federal aid, but states are not just "any" recipient. They are recipients with special constitutional responsibilities and prerogatives. Nor is the requisite specificity supplied by the legislative history. There is no evidence that Congress considered making states liable for damages in federal court actions brought by private parties. Rather, the legislative history shows only that the sponsors of Section 505, the remedial provision added in 1978, intended the 1978 amendments' attorney's fees provisions to apply against the states. This is a distinct and understandable concern, since *prospective* suits under Section 504 are a significant means for assuring compliance by the states, and the Eleventh Amendment does not bar such suits. Congress's intention to provide for attorney's fees to prevailing parties is very far from the necessary focused showing of a congressional intent to subject state treasuries to substantive liability for retrospective damages under the Act.

ARGUMENT

THE ELEVENTH AMENDMENT BARS FEDERAL COURTS FROM ENTERTAINING PRIVATE DAMAGE SUITS AGAINST THE STATES UNDER SECTION 504 OF THE REHABILITATION ACT

1. The question whether the federal courts may entertain private suits against the states is not new. It was a subject of active debate during the formation of our Republic. Only after the power of the federal courts to entertain such suits was disclaimed by advocates of the new federal government was the Constitution adopted. See *Edelman* v. *Jordan*, 415 U.S. 651, 660-662 & n.9 (1974) (citing 1 C. Warren, *The Supreme Court in United States History* 91 (rev. 1937); 3 *Elliott's Debates* 533, 557 (1836); and The Federalist No. 81 (A. Hamilton)). But the very first suit in the federal courts was brought by a foreign firm against the State of Maryland (*Vanstophorst* v. *Maryland*, see 2 U.S. (2 Dall.) 401 (1791); 1 C. Warren *supra*, at 91 n.1). After the institution of several similar suits against other states, the issue whether federal judicial power extended to such a case was presented squarely in *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), which held that the states were subject to suits in the federal courts brought by citizens of another state or foreign country.

The *Chisholm* decision generated great controversy. In just five years, strong opposition to the rule announced in *Chisholm* led to the adoption of the Eleventh Amendment, which provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

While the terms of the Eleventh Amendment do not specifically mention suits by a state's own citizens, it has long been clear that an unconsenting state is immune from suits

brought in federal courts by its own citizens as well as by citizens of another state or a foreign nation. *Hans* v. *Louisiana*, 134 U.S. 1 (1890). This is because, while the Eleventh Amendment "overruled the particular result in *Chisholm*, * * * its greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III" (*Pennhurst State School & Hospital* v. *Halderman*, No. 81-2101 (Jan. 23, 1984), slip op. 7). Ratification of the Amendment thus confirmed that the original delegation of judicial power made by the Constitution prohibited suits against the states in federal courts without their permission.

That the states' Eleventh Amendment immunity is a fundamental constitutional precept underlying our federal structure was reiterated recently by this Court in *Pennhurst* (slip op. 7-8, quoting *Ex parte State of New York No. 1*, 256 U.S. 490, 497 (1921) (emphasis in *Pennhurst*)):

> That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this Court that *the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given.*

Accordingly, a state's constitutional immunity is of "such compelling force" as to be a jurisdictional limitation which may be asserted at any point during litigation in which a state is a real party in interest. *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 464, 467 (1945). In sum, the Eleventh Amendment's grant of immunity is a fundamental constitutional underpinning of the relationship between the federal government and the states.

2. While fundamental, the Eleventh Amendment immunity of the states is not absolute. The Civil War Amendments are " 'limitations of the power of the States and enlargements of the power of Congress' " (*Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 454 (1976), quoting *Ex parte Virginia*, 100 U.S. 339, 345 (1880)). Section 5 of the Fourteenth Amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The Court has held that "the Eleventh Amendment, and the principle of state sovereignty which it embodies * * *, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment" (*Fitzpatrick* v. *Bitzer*, 427 U.S. at 456). Thus, when Congress acts pursuant to the Fourteenth Amendment, it may abrogate states' Eleventh Amendment immunity. Congress also has power to abrogate state immunity under other provisions of the Constitution, including the Commerce Clause (*Parden* v. *Terminal Ry.*, 377 U.S. 184, 191-192 (1964)).[5]

The issue in this case is how clear Congress must be when it abrogates states' Eleventh Amendment immunity. The court of appeals found that the literal inclusion of states within the term "any recipient" is sufficient to abrogate states' Eleventh Amendment immunity. This Court has made clear, however, that a much stricter standard applies. In *Hutto* v. *Finney*, 437 U.S. 678, 698 n.31 (1978), for example, the Court found that the Civil Rights Attorneys Fees Awards Act of 1976 "has a history focusing directly on the question of state liability; Congress considered and firmly rejected the suggestion that States should be immune

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[5]The parties agreed that Congress enacted Section 504 of the Rehabilitation Act pursuant to its power under Section 5 of the Fourteenth Amendment (C.A. Br. 31 n.27). Congressional power to enact Section 504 also rests on the spending power. Since congressional intent to abrogate Eleventh Amendment immunity is required regardless of the basis of Congress's power, and is not present here, the Court need not decide the constitutional source of that power.

from fee awards." The Court distinguished *Hutto* v. *Finney* in *Quern* v. *Jordan*, 440 U.S. 332, 345 (1979), where it concluded that 42 U.S.C. 1983 "does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States; nor does it have a history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States." And last Term, in *Pennhurst*, slip op. 8, the Court restated the rule that, while "Congress has power with respect to the rights protected by the Fourteenth Amendment to abrogate the Eleventh Amendment immunity, * * * we have required an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.' "

The decision in *Employees* v. *Department of Public Health*, 411 U.S. 279 (1973), illustrates how these principles should be applied in a factual setting that is nearly identical to this case. The plaintiffs in *Employees*, who worked in state health facilities, sought damages for overtime compensation due them under the Fair Labor Standards Act. The definition of "employer" under the Act originally excluded states. But a 1966 amendment to the definition provided that states were "employers" with respect to employees in state health facilities. Thus, the Court held, under "the literal language of the present Act, Missouri and the departments joined as defendants are constitutionally covered by the Act" (411 U.S. at 283). But that did not answer the question "whether Congress has brought the States to heel, in the sense of lifting their immunity from suit in a federal court" (*ibid*). The Court held that literal inclusion of the states in the definition of "employer" under the Act was not enough to abrogate states' Eleventh Amendment immunity, since "Congress, acting responsibly, would not be presumed to take such action silently" (411 U.S. at

284-285). The Court "found not a word in the history of the 1966 amendments to indicate a purpose of Congress to make it possible for a citizen * * * to sue the State in the federal courts" (*id.* at 285). Under *Employees*, therefore, it is clear that a general inclusion of states within a broad category of defendants is not enough to abrogate their Eleventh Amendment immunity. Rather, clear evidence of a focused congressional intention on states' Eleventh Amendment immunity is required.

The Court in *Employees* specifically addressed the federal government's argument that such a holding rendered the amendments "meaningless" and provided "a right without a remedy" (411 U.S. at 285-287). The government's argument was based on the contention that the agency empowered to enforce the Act could not, without the supplement of private federal court suits against the states, effectively provide assistance to the 45.4 million employees covered by the Act, especially since it was not clear that state courts would entertain private damage actions. Despite these problems, the Court refused to put "the States on the same footing as other employers," since Congress had not clearly shown its intention to abrogate their Eleventh Amendment immunity.[6]

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[6]The Ninth Circuit did not cite *Employees* in its decision in this case. It relied instead on *Parden* v. *Terminal Ry.*, 377 U.S. 184 (1964), and *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959).

In *Parden*, the Court found the Federal Employers' Liability Act, which provides that "[e]very common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier" and that "an action may be brought in a district court of the United States" (45 U.S.C. 51, 56), had abrogated the Eleventh Amendment immunity of a railroad operated by Alabama. *Parden* may be distinguished on the ground that the Act specifically provided for private actions in federal courts (see pages 13-16, *infra*). It is also arguable, as Justice Brennan, the author of the Court's opinion in *Parden*, argued in dissent in *Employees*, that *Parden* cannot really be

Finally, it is clear that a State does not waive its Eleventh Amendment immunity merely by receiving federal funds. *Florida Department of Health & Rehabilitation Services* v. *Florida Nursing Home Ass'n*, 450 U.S. 147 (1981); *Edelman* v. *Jordan*, 415 U.S. 651 (1974). Indeed, given the multiplicity of such federal programs, any such implied waiver would leave little scope for the special responsibilities and prerogatives reserved to the states under the Eleventh Amendment. In the *Florida Nursing Home* decision, the Court rejected an argument that, by receiving federal funds and agreeing to be bound by federal law, the state had waived its immunity. The Court relied on *Edelman*, which stated that "[i]n deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction' " (415 U.S. at 673; quoting *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)). The Court held that "[t]he mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts" (415 U.S. at 673). Thus, in the

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squared with *Employees* (411 U.S. at 298-308). It is certainly difficult to conclude that the mere literal inclusion of a state-run railroad in the class of potential defendants in damage actions in federal courts is the type of clear and unequivocal abrogation of Eleventh Amendment immunity required by *Hutto* v. *Finney*, *supra*, *Quern* v. *Jordan supra*, and *Pennhurst*.

Petty is clearly distinguishable. The Court construed a clause in an interstate compact, which expressly provided that the compact did not diminish the power of federal courts, as a waiver of a state's immunity from a suit brought by an employee of an interstate carrier formed under the compact (359 U.S. at 277-278). There is simply no such waiver here (see pages 12-13, *infra*).

congressional authorization to abrogate the Eleventh Amendment immunity of state recipients of funds under the Rehabilitation Act, a state does not waive its immunity merely by receipt of such funds.

3. The question is whether Congress clearly and unequivocally expressed an intention to abrogate states' Eleventh Amendment immunity when it adopted the Rehabilitation Act. This Court reviewed the history and purpose of the Act last Term in *Consolidated Rail Corp.* v. *Darrone*, No. 82-862 (Feb. 28, 1984). In that case a plaintiff alleged that a private employer that received federal financial assistance had violated rights conferred by Section 504. He sought damages under Section 505(a)(2) of the Act. As the court noted, Section 504, as adopted in 1974, did not provide any express remedies. The Act was amended in 1978 to provide, in Section 505(a)(2) (see note 2, *supra*), that the remedies "set forth in title VI of the Civil Rights Act of 1964 * * * shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance" under Section 504. Thus, Congress decided in 1978 that the remedies available to enforce Section 504 are the same as those then thought to be available under Title VI. However, critical questions concerning the nature of the Title VI remedies had not yet been decided in 1978.

Among those questions was whether there existed any private right of action at all under Title VI. This issue was addressed the next year in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979). The precise issue in *Cannon* was whether a private right of action against a private party exists under Title IX, the remedial provisions of which also incorporate the remedies of Title VI. The Court held that, since a number of federal courts had found that a private right of action exists under Title VI at the time Title IX was adopted, that Congress must have assumed that a similar private right of action exists under Title VI and hence under

Title IX as well (441 U.S. at 696). In *Darrone*, the Court last Term assumed that a similar private right of action against a private party exists under Section 504 of the Rehabilitation Act (slip op. 5 & n.7).

Another unanswered question in 1978 was whether retrospective relief was available to private plaintiffs under Title VI. In 1983, in *Guardians Ass'n* v. *Civil Service Commission*, No. 81-431 (July 1, 1983), a majority of the Court held that a private plaintiff under Title VI could recover backpay (see *Darrone*, slip op. 5-6 & n.9).[7] In *Darrone*, the Court similarly held that backpay was available under Section 504 against a private party (slip op. 6).[8] The federal courts previously had been in conflict on this issue (see *Ciampa* v. *Massachusetts Rehabilitation Comm'n*, 718 F.2d 1, 5 (1st Cir. 1983)). It should be emphasized that neither the defendant in *Guardians Ass'n* nor *Darrone* was a state agency protected by the Eleventh Amendment.[9]

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[7]In *Moreno* v. *Texas Southern University*, 573 F. Supp. 73 (S.D. Tex. 1983), the court, after noting "[s]urprisingly, there is a dearth of case law on the issue of whether damages may be awarded against any party under Title VI" (*id.* at 76), and reviewing the opinions in *Guardians Ass'n*, held that, because of Eleventh Amendment concerns, "the plaintiff is limited to equitable relief for his Title VI claims" (*id.* at 77).

[8]In holding in *Darrone* that the plaintiff "may recover backpay in the present § 504 suit" (slip op. 6), the Court noted that "statements made in relation to subsequent legislation * * * endorse the availability of backpay," citing S. Rep. 96-316, 96 Cong., 1st Sess. 12-13 (1979) (slip op. 6 n.10). The cited statement of the Senate Labor and Human Resources Committee does not refer to the states or to the Eleventh Amendment in connection with awards of backpay. This subsequent legislative statement that fails to mention the Eleventh Amendment clearly is inadequate to abrogate states' immunity.

[9]Also unanswered in 1978 was whether Title VI eliminated states' Eleventh Amendment immunity. Even if it were clear that Congress, in enacting Title VI, intended to abrogate that immunity, that would not be enough to show that Congress intended to remove the Eleventh

It would be remarkable if Congress, which did not make absolutely clear in 1978 that any private right of action for damages existed at all to enforce the rights granted in Section 504 of the Rehabilitation Act, had made clear that it intended to abrogate the states' Eleventh Amendment immunity. As restated last Term in *Pennhurst*, congressional intention to abrogate the Eleventh Amendment must be "unequivocally expressed" (slip op. 8). Congress made no such unequivocal expression. It provided that the remedies available under Title VI would be available against "any recipient" of federal assistance, and states are "recipients." But it was not clear in 1978 what those remedies were. And Congress certainly never went so far as to state that they included federal court actions seeking retrospective relief from the states. The requisite unequivocal expression to abrogate states' Eleventh Amendment immunity is lacking.

The legislative history of the 1978 amendments, far from showing any clear intent to abrogate Eleventh Amendment immunity, supports the position that Congress did not intend to authorize retrospective damage actions against the states. Section 505(b) authorized attorney's fees to the prevailing party in actions brought under the Rehabilitation Act. Senator Cranston, the author of Section 505, stated on the Senate floor that, under *Hutto* v. *Finney*, the Eleventh Amendment was not a bar to the recovery of attorney's fees from states (124 Cong. Rec. 30347 (1978)). It is significant that the author of Section 505 showed that he

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Amendment bar merely by cross-referencing Title VI in Section 505(a)(2) of the Rehabilitation Act. Such a cross-reference is not the requisite clear and unequivocal expression of congressional intent. Further indicia of focused congressional intent would be required. This is all the more true when the cross-reference is to a provision, such as Title VI, which had not been construed as abrogating Eleventh Amendment immunity.

understood that the Eleventh Amendment affected the provision, and expressed his opinion that it did not bar the award of attorney's fees under 505(b), but made no mention of the Eleventh Amendment in discussing Section 505(a)(2), the remedial provision implementing Section 504.[10]

This analysis of the attorney's fees provision of the 1978 amendments does not render the amendments meaningless in suits against state recipients or interpret them as providing a right without a remedy. Rather, it supports the position that Congress did not intend to abrogate the Eleventh Amendment immunity of states from retrospective damage suits when it enacted Section 505(a)(2). Under settled Eleventh Amendment doctrine, plaintiffs may seek prospective relief in federal courts in a suit for injunctive relief brought against state officials (*Ex parte Young*, 209 U.S. 123 (1908)). Under Section 505(b) and *Hutto* v. *Finney*, a plaintiff may, in an appropriate case, obtain attorney's fees from the states. Thus, a handicapped person such as this plaintiff, if his claim has merit, may be able to obtain injunctive relief in the form of an order requiring a state agency to hire him and an award of attorney's fees.[11]

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[10]The 1978 amendments also provided, in Section 505(a)(1), for remedies against the federal government. Noting that, under *United States* v. *Testan*, 424 U.S. 392 (1976), backpay will not be awarded against the federal government unless it is "specifically allowed by federal statute," the Senate Report cited *Testan* and explained that Congress intended that backpay be available against the federal government for violations of Section 501 (S. Rep. 95-890, 95th Cong., 2d Sess. 1978)). Congress should have been equally aware, in light of *Employees* v. *Department of Public Health, supra*, and *Edelman* v. *Jordan, supra*, that it must clearly express an intention to permit retrospective damage suits against states in federal court if it so intended. Yet it said nothing.

[11]Plaintiff may not be able to obtain such relief in this suit because he failed to name state officials as defendants.

But, in the absence of clear congressional intent, he may not obtain retrospective relief in a federal court proceeding.

In short, the First Circuit properly evaluated the text and history of the Rehabilitation Act in *Ciampa* v. *Massachusetts Rehabilitation Comm'n, supra.* It noted that "Congress never got as far as explicitly providing a private cause of action under section 504" (718 F.2d at 3). Accordingly, it concluded that "Congress did not abrogate the states' Eleventh Amendment immunity" and that states receiving funds under the Rehabilitation Act do not thereby waive their immunity (718 F.2d at 3-4).[12]

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[12]The Northern District of Illinois has reached the same conclusion (*Jones* v. *Illinois Department of Rehabilitation Services*, 504 F. Supp. 1244 (N.D. Ill. 1981), modified on other grounds, 689 F.2d 724 (7th Cir. 1982). The court held that "section 504 * * * does not contain the requisite explicit Congressional authorization to enable individuals to bring suits against the states" (504 F. Supp. at 1257). It noted that, although Section 505(a)(2) provides that the remedies set forth in Title VI are available under Section 504, "title VI does not indicate that Congress intended to permit retrospective relief despite the Eleventh Amendment" (504 F. Supp. at 1257 n.54).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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